

the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence part of, an Act which said that "the Commission may prescribe such rules and regulations as may be necessary to carry out the provisions of this Act."<sup>42</sup>

The scope of the Commission's authority must be analyzed under the comprehensive language of the Act's jurisdictional provisions.

When viewed in its historic context and pursuant to more than six decades of judicial interpretation, it becomes apparent that the Commission retains authority to regulate a broad range of matters and persons and possesses ample jurisdiction to remedy the MTE access problem. Self-imposed restrictions on the scope of the Commission's regulation threaten to impair the ability of the Commission to fulfill its statutory obligations and, consequently, will slow competition and disserve the public interest.

There are several ways for the Commission to find and exercise its jurisdiction to require MTE access. First, pursuant to Section 2(a) (and the relevant definitions referenced therein), the Commission has broad authority to require the availability of MTE access as a function of regulating interstate wire and radio communications. In addition to this sweeping mandate, several more specific provisions of the Act provide an ancillary basis of authority for Commission regulation. These provisions -- each providing authority for a component of MTE

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<sup>42</sup> Id. at n.5.

access -- are not the exclusive means available for accomplishing MTE access. Although they offer a variety of available jurisdictional mechanisms, the more sweeping authority of Section 2(a) remains available. Finally, the Commission may wish to require MTE access indirectly through its regulation of telecommunications carriers. The various available jurisdictional options are discussed more fully below.

**A. The Subject Matter And Scope Of The Commission's Jurisdiction Is Broad.**

The Commission retains broad primary authority over interstate wire and radio communications that dates to the passage of the Communications Act of 1934. Section 2(a) provides the Commission's subject matter and in personam jurisdiction over all interstate and foreign communication by wire and radio, and to all persons engaged within the United States in such communication or such transmission of energy by radio.<sup>43</sup> The sweeping language of Section 2(a) suggests a comprehensive jurisdictional mandate. The encompassing definitions of "radio communication"<sup>44</sup> and "wire communication"<sup>45</sup> in Section 3 to

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<sup>43</sup> 47 U.S.C. § 152(a) ("The provisions of this act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio . . . ") (emphasis added).

<sup>44</sup> 47 U.S.C. § 153(33) ("The term 'radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission") (emphasis added).

include items and services incidental to such communication further emphasize the comprehensive nature of the Commission's authority. All subsequent provisions of the Act are properly considered in the light of this expansive and flexible basis of authority.

The courts consistently and repeatedly have emphasized that Congress recognized its inability to predict developments in the dynamic sphere of communications and consequently provided the Commission with significant discretion and authority to regulate within the scope of its expertise.<sup>45</sup> Restrictions on the

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<sup>45</sup> 47 U.S.C. § 153(51) ("The term 'wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission") (emphasis added).

<sup>46</sup> See, e.g., F.C.C. v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940) ("Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."); see also National Broadcasting Co. v. U.S., 319 U.S. 190, 218-219 (1943) ("True enough, the Act does not explicitly say that the Commission shall have power to deal with network practices found inimical to the public interest. But Congress was acting in a field of regulation which was both new and dynamic. . . . the Act gave the Commission not niggardly but expansive powers."); see also Philadelphia Television Broadcasting Co. v. F.C.C., 359 F.2d 282, 284 (D.C. Cir. 1966) ("Congress in passing the Communications Act in 1934 could not, of course, anticipate the variety and nature of methods of communication by wire or radio that would come into existence in the decades to come. In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry").

Commission's ability to address new issues or problems concerning interstate radio and wire communication would impair the realization of the Commission's mandate to safeguard and promote the public interest. Bearing this in mind, it becomes apparent that the Commission's scope of authority is not limited to those matters expressly mentioned in the Communications Act.<sup>47</sup>

Congress' experience in dynamic regulation led it to adopt an approach in which it "define[d] broad areas for regulation and . . . establishe[d] standards for judgment adequately related to their application to the problems to be solved."<sup>48</sup>

Although the provisions of the Act address a number of discrete issues, the Act also contains several provisions, in addition to Sections 1, 2, and 3, which confer broad general authority on the Commission. For example, Section 4(i) allows the Commission to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."<sup>49</sup> In a similar fashion, Section 303(r) permits the Commission to "[m]ake such rules and regulations and prescribe such

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<sup>47</sup> See, e.g., National Broadcasting Co. v. U.S., 319 U.S. at 219 ("While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency").

<sup>48</sup> Id.

<sup>49</sup> 47 U.S.C. § 154(i).

restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ."50 The D.C. Circuit observed that the Communications Act comprises "a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest."<sup>51</sup> Most recently, the Supreme Court explained the broad basis of the Commission's authority, noting that

even though "Commission jurisdiction" always follows where the Act "applies," Commission jurisdiction (so-called "ancillary" jurisdiction) could exist even where the Act does not "apply."<sup>52</sup>

Hence, the Commission retains ample authority to regulate access to tenants in MTEs notwithstanding the absence of express reference to such access within the Communications Act.

**B. The Commission Has Recognized And Invoked Its Broad Authority.**

Historically, the Commission has broadly interpreted the scope of its authority and has properly exerted jurisdiction over matters not expressly mentioned within the Act but which are contemplated by the broad terms of Sections 2 and 3, as well as those matters explicitly addressed in the Act. The regulation of cable television offers an historic example. Initially, the Commission declined to regulate community antenna television ("CATV") systems because the Commission felt it needed direct

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<sup>50</sup> 47 U.S.C. § 303(r).

<sup>51</sup> Philadelphia Television Broadcasting, 359 F.2d at 284.

<sup>52</sup> AT&T Corp. v. Iowa Utilities Bd., 119 S.Ct. 721, \_\_\_, 142 L.Ed.2d 834, 850 (1999).

authority from Congress,<sup>53</sup> because it believed it lacked plenary authority to regulate CATV,<sup>54</sup> and because the Commission could discern no substantial adverse impact of CATV on local broadcasters.<sup>55</sup>

Over the course of seven years, the CATV industry expanded significantly and the Commission's view of the need for regulation and its authority to regulate changed dramatically. It came to believe that CATV could pose a risk to television broadcasters' ability to serve fully the needs and interests of their communities,<sup>56</sup> particularly new UHF stations which were "in a critical period with respect to UHF development."<sup>57</sup> The Commission noted an absence of adequate data to isolate the effects of CATV competition on television broadcasting,<sup>58</sup> but nonetheless recognized the potential for serious adverse effects.<sup>59</sup> The Commission took notice of its duty to act in

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<sup>53</sup> CATV and TV Repeater Services, Docket No. 12443, *Report and Order*, 26 FCC 403 at ¶¶ 59, 61 (1959) (expressing a lack of jurisdiction despite an assumption that CATV systems fell within the scope of Section 3(a)'s definition of "wire communications").

<sup>54</sup> Id. at ¶ 64 ("we do not believe we have 'plenary power' to regulate any and all enterprises which happen to be connected with one of the many aspects of communications").

<sup>55</sup> Id. at ¶ 70.

<sup>56</sup> Rules re: Microwave TV, Docket Nos. 14895 and 15233, *First Report and Order*, 38 FCC 683 at ¶ 69 (1965).

<sup>57</sup> Id. at ¶ 72.

<sup>58</sup> Id. at ¶ 68.

<sup>59</sup> Id. at ¶ 69.

advance of the occurrence of detrimental consequences<sup>60</sup> and concluded that regulation of CATV through carriage requirements and reasonable nonduplication obligations was in the public interest.<sup>61</sup>

In its Second Report and Order, released the following year, the Commission considered its authority to regulate microwave and non-microwave CATV systems.<sup>62</sup> In an attachment, the Commission observed that CATV services constitute interstate wire communication as understood by Section 3 of the Communications Act.<sup>63</sup> Although CATV systems were not licensees of the Commission, they nevertheless engaged in "interstate communication by wire" and, hence, were subject to the Commission's jurisdiction.<sup>64</sup> Moreover, the Commission identified

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<sup>60</sup> Id. at ¶ 48 ("Our responsibilities are not discharged . . . by withholding action until indisputable proof of irreparable damage to the public interest in television broadcasting has been compiled - i.e., by waiting 'until the bodies pile up' before conceding that a problem exists. Our duty is 'to encourage the larger and more effective use of radio in the public interest' - ensure that all the people of the United States have the maximum feasible opportunity to enjoy the benefits of broadcasting service. To accomplish this goal, we must plan in advance of foreseeable events, instead of waiting to react to them").

<sup>61</sup> Id. at ¶ 76.

<sup>62</sup> CATV, Docket Nos. 14895, 15233 and 15971, 2 FCC2d 725, Second Report and Order (1966).

<sup>63</sup> Id. at 794.

<sup>64</sup> Id. at ¶ 12. Parties to the proceeding argued that specific authority over CATV from the Act was required before the Commission could regulate nonlicensees. Otherwise, these parties contended, the Commission could utilize its general rulemaking authority to regulate any business with an impact on broadcasting or which uses communications facilities. See id. at ¶ 11. The Commission rejected the application of

CATV as an interstate communication service despite the fact that cable facilities did not cross State lines. It concluded that "a communications service can be interstate or foreign in nature and subject to the Commission's jurisdiction even though all the facilities are located within the confines of one State."<sup>65</sup>

Having concluded that CATV systems fell literally within the scope of the Commission's jurisdiction, the Commission explained that Sections 4(i) and 303(r), inter alia, provide it broad rulemaking authority over interstate communications and persons coming within that jurisdiction.<sup>66</sup> It noted the Supreme Court's affirmance of the "expansive" and "comprehensive" powers granted to the Commission by Congress through the Communications Act,<sup>67</sup> despite the absence of specific reference to the subject matter of regulation in the Act.<sup>68</sup>

The Supreme Court subsequently affirmed the Commission's reasoning, holding that the Commission's authority to regulate CATV was "reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of

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this argument to the CATV context because CATV systems were actually engaged in interstate wire communication, "a business to which the act's provisions are expressly applicable," and because "they physically intercept and extend television signals, and thus have a uniquely close relationship to the regulatory scheme embodied in sections 303(h) and 307(b)." Id. at ¶ 12.

<sup>65</sup> Id. at 794.

<sup>66</sup> Id. at 795.

<sup>67</sup> Id.

<sup>68</sup> Id. at 796.



television broadcasting."<sup>69</sup> The Court confirmed the expansive nature of the Commission's authority stating that "[w]e have found no reason to believe that § 152 does not, as its terms suggest, confer regulatory authority over 'all interstate . . . communication by wire or radio.'"<sup>70</sup> This authority permits the regulation of CATV systems.<sup>71</sup> The Court relied on its earlier holding that it may not, "in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes."<sup>72</sup> Moreover, the successful performance of the Commission's broadcast regulatory obligations reasonably demanded its regulation of CATV systems, despite some uncertainty as to the consequences of unregulated CATV.<sup>73</sup> Finally, the Court found "unpersuasive" the argument that "the Commission's authority is limited to licensees, carriers, and others specifically reached by the Act's other provisions,"<sup>74</sup> a finding particularly relevant to the Commission's consideration of ensuring that MTE owners and

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<sup>69</sup> See United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968).

<sup>70</sup> Id. at 173.

<sup>71</sup> Id. at 178 ("the Commission's authority over 'all interstate . . . communication by wire or radio' permits the regulation of CATV systems").

<sup>72</sup> Id. at 177 (quoting Permian Basin Area Rate Cases, 390 U.S. 747, 780 (1968)).

<sup>73</sup> Id. at 177.

<sup>74</sup> Id. at n.37.

managers do not obstruct tenant access to telecommunications carriers.

The Supreme Court subsequently confirmed that Section 2(a) does not operate as a mere "prescription of the forms of communication to which the Act's other provisions governing common carriers apply," but rather itself confers regulatory authority on the Commission.<sup>75</sup> It clarified that the Commission possessed "authority to regulate CATV with a view not merely to protect but to promote the objectives for which the Commission had been assigned jurisdiction over broadcasting,"<sup>76</sup> an authority which included the power to impose affirmative obligations, such as the compulsory origination of programs by CATV systems.<sup>77</sup>

**C. The Provision Of Nondiscriminatory MTE Access Is Reasonably Ancillary To Several Specific Provisions Of The Communications Act.**

The Commission retains general authority to mandate access for tenants in MTEs to the telecommunications carrier of their choice. Still other provisions of the Communications Act direct the Commission to act in a specific manner and the provision of MTE access is reasonably ancillary to accomplishment of their direction.

For example, Section 224 gives the Commission authority to enforce a telecommunications carrier's right to access a

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<sup>75</sup> United States v. Midwest Video Corp., 406 U.S. 649, 660 (1972).

<sup>76</sup> Id. at 667.

<sup>77</sup> See National Cable Television Ass'n v. U.S., 415 U.S. 336, 339 (1974).

utility's right-of-way for the provision of telecommunications services.<sup>78</sup> Teligent and WinStar have explained to the Commission how this provision operates within the context of MTEs.<sup>79</sup> In its efforts to minimize the prospective operation of historic monopoly power over essential facilities, Congress required the provision to telecommunications carriers of access to, inter alia, rights-of-way under utilities' ownership or control. The intent, when viewed through the lens of even a rudimentary antitrust analysis, is clear: Congress sought to diffuse monopoly control over essential facilities to permit the development of competition. It would derogate this goal for the Commission to construe Section 224 in a manner that opens only some essential facilities to competitive use and not others. Section 224 contemplates rights-of-way as separate and distinct from poles, ducts, and conduit.<sup>80</sup> It has been explained to the

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<sup>78</sup> 47 U.S.C. § 224.

<sup>79</sup> See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, CS Docket No. 97-151, *Comments of Teligent* (filed Sept. 26, 1997); *Comments of WinStar* (filed Sept. 26, 1997); *Reply Comments of Teligent* (filed Oct. 21, 1997); *Reply Comments of WinStar* (filed Oct. 21, 1997); *Petition for Reconsideration of Teligent* (filed April 13, 1998); *Comments of WinStar Communications, Inc. Supporting and Opposing Petitions for Reconsideration* (filed May 12, 1998); *Reply to Oppositions to the Petition for Reconsideration and Clarification of Teligent* (filed May 22, 1998); see also Commission Actions Critical to the Promotion of Efficient Local Exchange Competition, CCBPol 97-9, *Comments of Teligent* (filed Aug. 11, 1997); *Recommendations of WinStar Communications, Inc.* (filed Aug. 11, 1997).

<sup>80</sup> See Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments,

Commission that Section 224's reference to rights-of-way is not limited to "public" rights-of-way, and includes those rights-of-way within and on top of MTEs. A narrow interpretation of Section 224 to exclude MTE access risks perpetuating monopoly control over tenants in MTEs, a result at odds with the stated goal of the 1996 Act.<sup>81</sup>

In addition, Section 706 of the 1996 Act supports the Commission's requirement of MTE access.<sup>82</sup> Section 706 requires the Commission to promote deployment of advanced telecommunications capability to all Americans in a timely fashion. Indeed, "advanced telecommunications services," by definition, are not technology specific.<sup>83</sup> Many CLECs, including fixed wireless carriers, already provide and intend to continue providing services that fall within this category such as high-speed data services and Internet access. Yet the availability of these services for that sector of the American population in MTEs

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CS Docket No. 97-151, *Notice of Proposed Rulemaking*, 12 FCC Rcd 11725 at ¶ 42 (1997).

<sup>81</sup> See Local Competition Order at ¶ 16 (observing that "[v]igorous competition would be impeded by technical disadvantages and other handicaps that prevent a new entrant from offering services that consumers perceive to be equal in quality to the offerings of incumbent LECs").

<sup>82</sup> Pub. L. No. 104-104, 110 Stat. 56, 153 at § 706 ("Section 706").

<sup>83</sup> See Section 706(c)(1) ("The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology"); see also Advanced Services Report at ¶ 23.

is impeded by access restrictions. The Commission recognized that if a significant portion of units in multi-tenant environments "is not accessible to competitive providers of broadband, that fact could seriously detract from local competition in general and the achievement of broadband availability to 'all Americans' in particular."<sup>84</sup> The problem is occurring on a grand scale. Section 706 provides the Commission with the authority and the obligation to require MTE access for telecommunications carriers so that consumers in MTEs may obtain access to advanced telecommunications services.

Section 207 of the 1996 Act represents another basis of ancillary authority for mandatory MTE access. Section 207 prohibits restrictions that impair a viewer's ability to receive video programming services through devices designed for over-the-air reception of television broadcast signals ("TVBS"), multichannel multipoint distribution service ("MMDS"), or direct broadcast satellite service ("DBS").<sup>85</sup> The authority and principles contained in Section 207 serve as an ancillary basis of Commission authority to ensure that tenants in MTEs have access to their telecommunications carrier of choice for the provision of broadband services that include local exchange service, Internet access, or video programming services.

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<sup>84</sup> Advanced Services Report at ¶ 104.

<sup>85</sup> The prohibition is not absolute. Restrictions are permissible if they are necessary to accomplish a clearly defined safety objective or to preserve an historic district listed on or eligible for listing on the National Register. 47 C.F.R. § 1.4000(b).

In fact, the expansion of Section 207 to include additional categories of video programming distributors would provide direct authority for the Commission to require rooftop access for fixed wireless carriers. Such an expansion would not be unprecedented. The Commission declined to narrowly restrict the scope of Section 207 to MMDS. Instead, it concluded that services technologically and functionally similar to MMDS should also be included within the scope of Section 207.<sup>86</sup> Similarly, fixed wireless service providing high-speed Internet access and with the capability to provide video programming services are reasonably included within this provision: their antennas are sufficiently small and they receive video programming over the air.

Observing that Congress "seemed to focus on the size of the antenna, rather than the specific technology, as a basis of distinction,"<sup>87</sup> the Commission concluded that MMDS, ITFS, LMDS, and DBS antennas must be one meter or less in diameter to be

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<sup>86</sup> See Preemption of Local Zoning Regulation of Satellite Earth Stations; Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, IB Docket No. 95-59, CS Docket No. 96-83, Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 11 FCC Rcd 19276 at ¶ 30 (1996) ("OTARD Order") (noting that MDS, ITFS, and LMDS were similar to MMDS in that "point-to-multipoint subscription video distribution service can be provided over each of them"). Moreover, the Commission noted that MMDS or similar services could be provided over the frequencies allocated to ITFS and LMDS and that all of these services were related in that their origins could be traced to MDS. See id.

<sup>87</sup> Id. at ¶ 28.

covered by Section 207.<sup>88</sup> Many fixed wireless carrier antennas are approximately 12-24 inches in diameter -- well within the antenna size limits established by the Commission.

Moreover, fixed wireless carriers offer services contemplated by Section 207. Internet-based video offerings continue to proliferate. They increasingly appear similar to video programming offered by a television broadcast station and, therefore, would appear to constitute video programming. Although the Commission declined to adopt a broad definition of "video programming services"<sup>89</sup> for purposes of Section 207, rapid technological developments that render an increased amount of "broadcast" programming over the Internet warrant reconsideration of that conclusion. Some Internet sites, such as Microsoft Netshow, currently provide the capability to watch full motion broadcast video.<sup>90</sup> Moreover, it was reported that NBC intends to invest in and supply programming to an Internet-based service, Intertainer.<sup>91</sup> In its most recent video competition report to Congress, the Commission referred to the Internet as an increasingly competitive source of video programming and noted

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<sup>88</sup> See *id.* at 5; see also 47 C.F.R. § 1.4000(a)(1).

<sup>89</sup> Implementation of Section 207 of the Telecommunications Act of 1996; Restrictions on Over-the-Air Reception Devices: Television Broadcast Service and Multichannel Multipoint Distribution Service, CS Docket No. 96-83, Order on Reconsideration, 13 FCC Rcd 18962 at ¶ 56 (1998).

<sup>90</sup> <[www.microsoft.com/netshow/live](http://www.microsoft.com/netshow/live)>.

<sup>91</sup> Andrew Pollack, "NBC Backing an On-Line TV Service," New York Times, at D4 (Aug. 3, 1998).

the development of technologies to enhance this phenomenon.<sup>92</sup> This phenomenon is increasing. The Commission's rules implementing Section 207 should be expanded to broaden the available delivery mechanisms for video programming. Failure to do so would ignore the conversion that has already occurred.

The Commission's conclusions in the Section 207 Over-the-Air Reception Devices ("OTARD") Order may inform the appropriate approach in the context of MTE access. For example, in the OTARD Order, the Commission determined that impairment of a viewer's ability to receive over-the-air video programming reception includes unreasonable delays and increases in the cost of installation, maintenance or use of an antenna.<sup>93</sup> The delays prohibited by the OTARD Order are analogous to restrictions on and delays concerning MTE access for telecommunications carriers. The purpose behind Section 207 was the promotion of alternative delivery mechanisms for video programming.<sup>94</sup> Where carriers

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<sup>92</sup> Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Fourth Annual Report, 13 FCC Rcd 1034 at ¶¶ 97-102 (1998).

<sup>93</sup> OTARD Order at ¶¶ 14, 17.

<sup>94</sup> See H.R. Rep. No. 204, 104th Cong., 1st Sess., pt. 1, 123-24 (1995) ("The Committee intends this section to preempt enforcement of State or local statutes and regulations, or State or local legal requirements, or restrictive covenants or encumbrances that prevent the use of antennae designed for off-the-air reception of television broadcast signals or of satellite receivers designed for receipt of DBS services. Existing regulations, including but not limited to, zoning laws, ordinances, restrictive covenants or homeowners' association rules, shall be unenforceable to the extent contrary to this section."). The Conference Report adopted the House provision, with modifications to expand the scope of the provision. See S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 166 (1996).



provide a multitude of services such as Internet access, local exchange service and even the capacity for traditional video programming, their delivery mechanisms should be included within the scope of Section 207.

**D. The Commission Possesses Direct Authority Over Non-Telecommunications Carriers.**

It is conceivable that by exercising control over a portion of the telecommunications network, MTE owners act as telecommunications carriers to tenants within their MTEs. However, the Commission's authority to require telecommunications carrier access to tenants within MTEs does not depend upon classification of MTE owners as telecommunications carriers.

Assuming arguendo that the control over telephone facilities does not transform MTE owners into telecommunications carriers, the Commission still retains sufficient authority to address building access concerns. The Commission need not classify the MTE owner as a telecommunications carrier or as engaged in the provision of telecommunications service to retain jurisdiction over the MTE owner's practices as they affect interstate communications. The Commission's direct authority extends beyond carriers and cable operators. That is a direct consequence of the "all instrumentalities" clause of Sections 3(33) and 3(51).<sup>95</sup>

In a scenario quite similar to MTE access, the Commission concluded that "the provision of central office space for physical collocation is incidental to communications, thus

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<sup>95</sup> 47 U.S.C. §§ 153(33) and (51).

rendering it a communications service under Section 3 of the Communications Act."<sup>96</sup> It went on to explain that "[o]fferings are incidental to communications and therefore are communications themselves, if they are an integral part of, or inseparable from, transmission of communications."<sup>97</sup> Hence, the provision of space to enable communications transmission falls within the "all instrumentalities" component of wire communications.

The Hush-A-Phone case demonstrated the Commission's authority to preserve telephone subscribers' use of the telephone network in a manner that is "privately beneficial without being publicly detrimental."<sup>98</sup> The Commission's CPE Registration Program in Part 68 of its rules contains requirements for equipment manufacturers in a manner consistent with that authority to regulate connection of terminal equipment with the telephone network.<sup>99</sup>

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<sup>96</sup> Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport, CC Docket No. 93-162, Second Report and Order, 12 FCC Rcd 18730 at ¶ 20 (1997).

<sup>97</sup> Id. The Commission's determination that physical collocation is a common carrier service was derived under a separate analysis. See id. at ¶ 21.

<sup>98</sup> Hush-A-Phone Corporation v. United States, 238 F.2d 266, 269 (D.C. Cir. 1956).

<sup>99</sup> See 47 C.F.R. § 68.200-68.226; see also Deregulation of Telecommunications Services, CC Docket No. 79-252, Further Notice of Proposed Rulemaking, 84 F.C.C.2d 445 at ¶ 134 (1981) (noting the Fourth Circuit's determination that Part 68 was developed and upheld as a lawful exercise of authority) (citations omitted).

In addition, the Commission's inside wiring rules provide another operative example of its direct authority over non-carriers -- in this case, MTE owners.<sup>100</sup> In sum, the Commission's authority to accomplish nondiscriminatory MTE access is not dependent upon classification of MTE owners as telecommunications carriers.

**E. The Commission May Exercise Its Jurisdiction To Achieve Valid Regulatory Objectives Through Indirect Means.**

The Commission can secure tenant access to telecommunications options without imposing requirements directly upon MTE owners and managers. Indeed, in several circumstances, the Commission has accomplished its goals through indirect means. In circumstances in which the Commission's personal jurisdiction over particular entities was challenged, the Commission nonetheless fostered important goals by imposing requirements on entities over which it clearly retains jurisdiction in order to accomplish the desired ends.

For example, the Commission considered its jurisdiction over surcharges imposed by hotels and apartment houses on end user guests and tenants for interstate and foreign telephone calls. The Commission determined that the surcharges in question were charges for and in connection with the use of interstate and foreign telephone communication service and, therefore, were

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<sup>100</sup> See 47 C.F.R. § 68.3 (prescribing limits on a multiunit premises owner's ability to determine the location of a demarcation point); see also 47 C.F.R. § 68.213(b) (restrictions on subscribers and premises owners in the installation, removal, reconfiguration and rearrangement of inside wiring).

charges over which the Commission retained jurisdiction.<sup>101</sup> Moreover, the Commission concluded that the hotels and apartment houses served as "agents" for the telephone company and, therefore, the surcharges, if they were to be collected, must be reflected in tariffs.<sup>102</sup>

However, the Commission recognized that even outside the "agency" relationship, it could regulate indirectly the surcharges imposed by hotels and apartment houses on interstate telephone services through direct regulation of the carriers themselves. The Commission expressed the opinion

that a permissible alternative means of regulation of this matter is a tariff regulation specifying proper conditions upon which service is provided by [the telephone companies] to hotels, apartment houses, and clubs.<sup>103</sup>

Hence, through regulation of the carrier tariff requirements, the Commission could determine the reasonableness of hotel and apartment house activities related to interstate communications services. The Supreme Court did not see the need to determine the existence of an agency relationship. Rather, it affirmed the Commission's indirect regulation of the hotels and apartment houses through direct regulation of the carriers and their tariffs.<sup>104</sup>

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<sup>101</sup> See Special Telephone Charges of Hotels, Docket No. 6255, Report of the Commission, 10 F.C.C. 252, 262 (1943).

<sup>102</sup> See id. at 264.

<sup>103</sup> Id.

<sup>104</sup> See Ambassador, Inc. v. United States, 325 U.S. 317 (1945) ("We do not think it is necessary in determining the

Another example concerns the regulation of broadcast networks. The Commission concluded that "[t]he public interest requires limitation on [television broadcast] network control."<sup>105</sup> It accomplished this goal through indirect means by regulating the affiliates as opposed to the networks themselves. Specifically, the Commission limited the prime time programming that a network affiliate in the top 50 markets could take from a network.<sup>106</sup> The Second Circuit considered the extent to which the Commission could regulate network activities when the Commission believed those activities to impede the ability of licensees to serve the public interest. Although the court confirmed the Commission's authority to regulate networks directly,<sup>107</sup> it also approved the Commission's indirect method of controlling network behavior.<sup>108</sup>

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application of a regulatory statute to attempt to fit the regulated relationship into some common-law category. It is sufficient to say that the relation is one which the statute contemplates shall be governed by reasonable regulations initiated by the telephone company but subject to the approval and review of the Federal Communications Commission").

<sup>105</sup> Network Television Broadcasting, Docket No. 12782, *Report and Order*, 23 F.C.C.2d 382, 394 (1970).

<sup>106</sup> Id.

<sup>107</sup> See Mt. Mansfield Television, Inc. v. F.C.C., 442 F.2d 470, 480-81 (2d Cir. 1971) ("The fact that the statute contains no explicit authority to regulate the activity of networks is not conclusive . . . . The syndication and financial interest rules, though direct regulations of networks, as well as the prime time access rule, are within the Commission's statutory power") (citations omitted).

<sup>108</sup> See id.

The Commission used indirect means of accomplishing its goals more recently. For example, in the International Settlement Rates Report and Order,<sup>109</sup> the Commission established benchmark settlement rates that U.S. carriers may pay foreign carriers for termination of international traffic originating in the United States. It observed that:

significant margins on international termination fees that now prevail cause U.S. consumers to pay artificially high prices for international services and discourage foreign carriers from introducing effective competition and cost-based pricing for all telecommunications services.<sup>110</sup>

Moreover, the Commission noted that the margins on settlement rates could be used to "create competitive distortions in the market for U.S. international services."<sup>111</sup> The Commission reduced the settlement amounts paid by U.S. carriers in order to "fulfill [the Commission's] duty to ensure reasonable rates for U.S. consumers"<sup>112</sup> and to "promote competition in the United States market by using settlement rate benchmarks to remedy anticompetitive conditions in the international marketplace."<sup>113</sup>

The MCI/BT Decision offers another example of recent Commission regulation through indirect means. In the MCI/BT

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<sup>109</sup> International Settlement Rates, IB Docket No. 96-261, Report and Order, 12 FCC Rcd 19806 (1997) ("International Settlement Rates Report and Order").

<sup>110</sup> Id. at ¶ 2.

<sup>111</sup> Id.

<sup>112</sup> Id. at ¶ 5.

<sup>113</sup> Id.

Decision, the Commission noted the absence of equal access requirements in the United Kingdom and recognized that MCI's absorption into BT would increase BT's incentive "to leverage its market power over U.K. local access to adversely affect competition in the global seamless services market."<sup>114</sup> The Commission observed that "[s]ince U.S. consumers are expected to be significant consumers in this market, we find that this vertical effect of the proposed merger will adversely affect U.S. consumers." It also determined that this "vertical effect will retard competition and is therefore within the scope of our public interest analysis of the proposed merger."<sup>115</sup> The Commission expressed its belief that swift implementation of equal access in the U.K. was necessary to eliminate the unfair advantages that otherwise would result from the proposed merger.<sup>116</sup>

Lacking direct jurisdiction to impose equal access requirements in the U.K., the Commission instead used its authority to approve or reject the proposed merger as a way of achieving the desired goal. The Commission noted its expectation that the U.K. would implement promptly equal access requirements<sup>117</sup> and accepted an MCI commitment not to accept BT

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<sup>114</sup> The Merger of MCI Communications Corp. and British Telecommunications, GN Docket No. 96-245, *Memorandum Opinion and Order*, 12 FCC Rcd 15351 at ¶ 189 (1997) ("MCI/BT Decision").

<sup>115</sup> Id.

<sup>116</sup> See id. at ¶ 293.

<sup>117</sup> See id. at ¶ 294.

traffic originated in the U.K. to the extent equal access had not been implemented as required by the U.K. government. To ensure strict compliance with equal access obligations, the Commission conditioned its approval of the proposed merger on an MCI commitment not to accept "BT traffic originated in the United Kingdom to the extent BT is found to be in non-compliance with U.K. regulations implementing the European Union's equal access requirements."<sup>118</sup> In this manner, the Commission once again accomplished its pro-competitive goals through indirect means.

Similarly, the Commission could accomplish access to tenants in MTEs through indirect means. For example, the Commission's jurisdiction over MTE owners could be exercised indirectly by prohibiting ILEC and CLEC interconnection with inside wire facilities or service to MTEs not available on a nondiscriminatory basis to all local carriers desiring access.

**VI. THE TAKINGS CLAUSE DOES NOT BAR THE PROMOTION OF ACCESS TO TELECOMMUNICATIONS COMPETITION FOR TENANTS IN MTEs.**

**A. If A Nondiscriminatory MTE Access Requirement Is Deemed To Constitute A Taking, It Remains Constitutional And The Commission Possesses The Authority To Effect Such A Taking.**

If an MTE access requirement constitutes a taking, it is fully constitutional. Simply because an act may be deemed a taking does not mean it is unconstitutional. Indeed, the Fifth Amendment expressly provides for takings. Takings are a constitutionally-contemplated phenomenon.

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<sup>118</sup> Id. at ¶ 294.



Of course, to survive constitutional scrutiny, just compensation must accompany any taking. To the extent that landlords are allowed to collect just compensation in exchange for access, an MTE access requirement would remain constitutionally sound.

The Loretto decision is of significance in this regard. In Loretto, a New York statute prohibited landlord interference with the installation of cable television facilities on the landlord's property and prohibited a landlord from demanding payment in excess of the level established by the State Commission on Cable Television. A landlord brought suit, complaining that the statute operated as a taking without just compensation. The sole matter at issue in the Supreme Court case was whether the New York statute constituted a taking; the Loretto Court determined that it did. The Court expressly did not rule on the constitutionality of that taking -- a wholly separate matter -- since an inquiry into just compensation is required for that determination and the Court did not consider the compensation issue.<sup>119</sup> Far from invalidating or otherwise ruling on the

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<sup>119</sup> See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982) ("Our holding today is very narrow. . . . [O]ur conclusion that § 828 works a taking of a portion of appellant's property does not presuppose that the fee which many landlords had obtained from Teleprompter prior to the law's enactment is a proper measure of the value of the property taken. The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand."). Although there was no subsequent judicial finding on the adequacy of the compensation (partly because landlords did not apply to the Cable Commission for reasonable compensation following the Supreme Court decision), a State court did characterize it as "altogether improbable [that it would be] eventually

constitutionality of the statute in Loretto, the Court merely passed upon its status as a taking. Consequently, the Loretto case demonstrates that whether a government regulation constitutes a taking and whether it is unconstitutional involves two separate inquiries. Moreover, an affirmative answer to the first inquiry does not correlate to an affirmative answer to the second.

Moreover, if MTE access is deemed a taking, the Commission retains the authority to require that the access be granted. An administrative agency is granted authority to effect a taking either explicitly or implicitly.<sup>120</sup> Takings authority is to be implied where it is "a matter of necessity, where 'the grant [of authority] itself would be defeated unless [takings] power were implied.'"<sup>121</sup>

The Communications Act implicitly grants the Commission authority in numerous instances to effect a taking in the MTE access context. Without such authority, the Commission's mandates under several separate provisions of the Act would be

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judicially determined that the very minimal compensation landlords stand to receive under the Executive Law § 828 compensatory scheme (in most cases \$1.00) does not amount to just compensation . . . ." Loretto v. Group W Cable, 135 A.D.2d 444, 448, 522 N.Y.S.2d 543, 546 (1987).

<sup>120</sup> Bell Atlantic Telephone Co. v. Federal Communications Comm'n, 24 F.3d 1441, 1446 (D.C. Cir. 1994).

<sup>121</sup> Id. (quoting Western Union Tel. Co. v. Pennsylvania R.R., 120 F. 362 (C.C.W.D.Pa.), aff'd, 123 F. 33 (3rd Cir. 1903), aff'd, 195 U.S. 540 (1904)).

defeated. Each of these provisions alone is sufficient to implicitly grant the Commission takings authority.<sup>122</sup>

First, the Commission retains authority to effect a taking pursuant to the general authority provided by Sections 4(i) and 303(r).<sup>123</sup> Section V contains an extensive analysis of this authority.

Moreover, the Commission receives authority to effect a taking pursuant to Section 253.<sup>124</sup> Section 253(a) prohibits State or local statutes, regulations, or other legal requirements that operate as a barrier to providing telecommunications service.<sup>125</sup> Subsection (d) requires the Commission to preempt any such statute, regulation, or legal requirement.<sup>126</sup> To the extent that State and local legal requirements (e.g., contract enforcement in state courts) preserve an MTE owner's ability to prohibit a carrier from providing telecommunications service through denial of MTE access, the laws would violate Section 253(a). Section 253's grant of Commission authority to preserve telecommunications competition implies the Commission's takings authority for accomplishment of that goal.

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<sup>122</sup> In addition to each of these, the Commission also has general authority to effect a taking under its ancillary jurisdiction in §§ 4(i) and 303(r).

<sup>123</sup> 47 U.S.C. §§ 154(i), 303(r).

<sup>124</sup> 47 U.S.C. § 253.

<sup>125</sup> 47 U.S.C. § 253(a).

<sup>126</sup> 47 U.S.C. § 253(d).

Second, the Commission has takings authority to implement Section 706, which governs the availability of advanced telecommunications capabilities. Section 706 directs the Commission to encourage the deployment of advanced telecommunications capability using, inter alia, "methods that remove barriers to infrastructure investment."<sup>127</sup> Upon any determination that advanced telecommunications capability is not being deployed to all Americans in a reasonable and timely fashion, the Commission is to "take immediate action...by removing barriers to infrastructure investment and by promoting competition in the telecommunications market."<sup>128</sup>

As noted in Section V, fixed wireless services fall within the category of advanced telecommunications services. MTE access restrictions impede the statutorily contemplated delivery of these services. If the Commission concludes that nondiscriminatory MTE access effects a taking, it follows that it cannot exercise its statutory authority to remove barriers to advanced telecommunications capability without takings authority. Hence, that authority is reasonably implied by Section 706.

Third, the Commission has authority to effect a taking by requiring nondiscriminatory MTE access to preserve the principles embodied in Section 254.<sup>129</sup> Section 254(a) charges the

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<sup>127</sup> Telecommunications Act of 1996 § 706(a), Pub. L. No. 104-104, 110 Stat. 70.

<sup>128</sup> Id. at § 706(b).

<sup>129</sup> 47 U.S.C. § 254.

Commission with creating a Joint Board on universal service and implementing the Joint Board's recommendations.<sup>130</sup> Pursuant to the Joint Board's Recommended Decision, one of the principles that must guide a universal service plan is competitive neutrality.<sup>131</sup> Without takings authority, some carriers would be precluded from providing tenants in MTEs with those services eligible for universal service funding -- a result squarely at odds with the guiding principle of competitive neutrality. Takings authority in the MTE access context must be implied in Section 254 in order for the Commission to implement a competitively neutral universal service scheme (pursuant to the Joint Board's Recommended Decision) and thereby follow its statutory mandate.

The Commission has the authority not only to effect a taking, but also to establish the minimum level of just compensation.<sup>132</sup> "The Fifth Amendment does not require a

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<sup>130</sup> 47 U.S.C. § 254(a).

<sup>131</sup> Pursuant to the Joint Board's recommendation, and as directed by the statute, the Commission added the principle of "competitive neutrality" to those enumerated in §§ 254(b)(1)-(6). See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 at ¶¶ 46-47 (1997) ("Universal Service Order"); Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Recommended Decision, 12 FCC Rcd 87 at ¶ 23 (1996).

<sup>132</sup> See Gulf Power Co. v. United States, 998 F.Supp 1386, 1397 (N.D.Fla. 1998) (citing Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186-94 (1985)). In Williamson County, the Supreme Court held that a takings claim was premature as long as the regulatory commission involved had not issued a final order regarding the application of the ordinance in question and because the

judicial determination of just compensation in the first instance on each occasion of a taking of private property."<sup>133</sup> Indeed, any concern over the inadequacy of compensation is guarded against by the ability of parties to seek judicial relief under the Tucker Act.<sup>134</sup>

**B. A Nondiscriminatory Requirement For Access Is Not A Taking.**

An analysis of current Takings Clause doctrine reveals that requiring that MTE access for telecommunications carriers be granted on a nondiscriminatory basis does not constitute a taking. In the first instance, MTE access does not amount to a compelled physical invasion; rather, it entails the regulation of contract rights and duties that already exist between MTE owners and tenants. Because of this, the inquiry into whether an MTE

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property owners had not sought compensation through state procedures before turning to the courts. Id.

<sup>133</sup> Id. at 1398 (quoting Wisconsin Central Ltd. v. Public Serv. Comm'n, 95 F.3d 1359, 1369 (7th Cir. 1996)).

<sup>134</sup> See 28 U.S.C. 1491(a)(1). See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 194-195 (1985) (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1013, 1018, n.21) ("If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking."); see also Presault v. ICC, 494 U.S. 1, 12 (1990) (noting that Congress must exhibit an "unambiguous intention to withdraw the Tucker Act remedy . . . to preclude a Tucker Act claim") (citations omitted). Nothing in the Communications Act indicates that Congress has foreclosed a Tucker Act remedy. See Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441, 1445, n.2 (D.C. Cir. 1994).

access obligation involves the element of "required acquiescence" is unwarranted.<sup>135</sup>

Regulatory modification of an existing contract between landlords and tenants is not a per se taking.<sup>136</sup> Contracts between MTE owners and tenants establish certain rights, either explicitly or implicitly.<sup>137</sup> For example, absent an express provision to the contrary, tenants have the right to access and use certain building common areas, as a way of necessity between the "landlocked" unit and the street outside.<sup>138</sup>

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<sup>135</sup> See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982); Federal Communication Commission v. Florida Power Corp., 480 U.S. 245 (1987). Nevertheless, the MTE owner retains a meaningful choice to exclude all telecommunications carriers from the MTE in the first instance. For example, an MTE owner could self-install and self-operate telecommunications facilities within a building.

<sup>136</sup> See Loretto, 458 U.S. at 441 ("We do not...question...the authority upholding a State's broad power to impose appropriate restrictions upon an owner's use of his property."). See also Gibbs v. Southeastern Investment Corp., 705 F. Supp. 738 (D.Conn. 1989) (holding that an Act which "simply adjusts the economic benefits and burdens" of the landlord-tenant relationship is not a per se taking).

<sup>137</sup> See, e.g., 49 Am. Jur. 2d Landlord and Tenant § 625 (1995) ("The implied covenant of quiet enjoyment in every lease extends to those easements and appurtenances whose use is necessary and essential to the enjoyment of the premises."). In Loretto, the Supreme Court declined to opine as to the respective rights of the landlord and tenant under state law, prior to the passage of the law at issue, to use the space occupied by the cable installation. 458 U.S. at 439 n.18.

<sup>138</sup> 49 Am. Jur. 2d Landlord and Tenant § 628 (1995) ("Where property is leased to different tenants and the landlord retains control of passageways, hallways, stairs, etc., for the common use of the different tenants, each tenant has the right to make reasonable use of the portion of the premises retained for the common use of the tenants."); see id. at § 651 ("The landlord's interference with the tenant's right

A nondiscriminatory building access requirement is not unlike the regulation at issue in Yee v. City of Escondido.<sup>139</sup> In Yee, the Court considered a rent control ordinance that restricted the termination of mobile home park tenancies. The Court found that the ordinance did not constitute a compelled physical occupation of land. The Court noted that the statute "merely regulate[d] petitioners' use of their land by regulating the relationship between landlord and tenant."<sup>140</sup> The Court went on to explain that

[w]hen a landowner decides to rent his land to tenants, the government may . . . require the landowner to accept tenants he does not like without automatically having to pay compensation.<sup>141</sup>

By requiring MTE owners to provide nondiscriminatory MTE access to telecommunications carriers, the Commission similarly adjusts existing contractual obligations of MTE owners vis-à-vis their tenants to comply with the public interest. Like the rent control ordinance in Yee, a nondiscriminatory MTE access requirement alters the relative rights existing under a rental contract and would not constitute a per se taking. Indeed, the

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of access and exit . . . may constitute a constructive eviction, especially in case of the lease of rooms or apartments in a building."). Tenants are also entitled to an implied right of necessity for the use of conduits and pipes through a building for utility services, even if it includes some enlargement. Id. at § 632.

<sup>139</sup> 503 U.S. 519 (1992).

<sup>140</sup> Id. at 528 (emphasis in original).

<sup>141</sup> Id. at 529 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964)).



MTE owners' provision of tenant access to telephone service will be altered by the Commission only to the extent that it gives tenants the right to access their carriers of choice.<sup>142</sup>

**C. Where No Physical Occupation Occurs, The "Required Acquiescence" Analysis Of *Loretto* Is Unwarranted.**

A nondiscriminatory MTE access requirement merely regulates a voluntarily executed contract. As explained above, the landlord retains the choice of excluding all telecommunications carriers; the nondiscriminatory access requirement does not permit telecommunications carrier access in the first instance. Because a physical invasion is not compelled (e.g., that initial "invasion" remains the choice of the landlord), a nondiscriminatory access requirement is not properly considered a per se taking. In short, the MTE owner retains a meaningful choice to avoid a nondiscriminatory MTE access obligation altogether and, accordingly, the "required acquiescence" inquiry need not be pursued.

In Loretto, the cable operator argued that a choice existed because building owners could avoid the statutory access requirements by ceasing to rent the property altogether. The

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<sup>142</sup> A regulation that is not a per se taking but rather a "public program adjusting the benefits and burdens of economic life to promote the common good" is analyzed by balancing the public and private interests involved. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978); see also Agins v. Tiburon, 447 U.S. 255, 260-61 (1980). Under this analysis, the public interest -- as defined by the Act's pro-competitive goals -- as well as the competitive benefits for tenants (and, indeed, for MTE owners in light of the resultant MTE value enhancement), outweigh perceived burdens on MTE owners to justify the provision of nondiscriminatory MTE access.

Court rejected that argument, expressing a concern that a "landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation."<sup>143</sup> In short, the landlord's acquiescence cannot be required.

The Yee Court limited Loretto's required acquiescence analysis to situations in which a physical occupation is found. That is, in Loretto, the statute allowed as an initial "invasion" access by a cable operator even where no cable operator had facilities in the building. By contrast, in Yee, no compelled physical occupation was found. As noted above, the ordinance was deemed a valid regulation of the contractual landlord-tenant relationship. Where, as in Yee, no compelled physical occupation is present -- that is, where the landlord has already permitted one telecommunications carrier into the building -- the MTE owner cannot be said to be forced into forfeiting the right to rent property in order to avoid a compelled physical occupation.<sup>144</sup> Therefore, the "required acquiescence" analysis is inapposite.

In sum, because nondiscriminatory MTE access does not involve a compelled physical occupation -- that choice is a voluntary one made by the MTE owner for the first carrier in the building -- the MTE owners' initial choice to exclude all telecommunications carriers is considered in a materially

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<sup>143</sup> Loretto, 458 U.S. at 439, n.17.

<sup>144</sup> Indeed, the effect is identical to a Commission-imposed prohibition on telecommunications carriers from serving MTEs to which nondiscriminatory access is not permitted.

different light than the manner in which the Loretto Court considered it.

Nevertheless, even if the "required acquiescence" analysis were pursued, a nondiscriminatory MTE access requirement does not amount to a taking because it lacks the necessary element of "required acquiescence."<sup>145</sup> The Supreme Court concluded that the Pole Attachment Act of 1978 did not effect a taking because there was no "required acquiescence."<sup>146</sup> That is, the Act simply gave the Commission authority to regulate rates; it did not force pole owners to enter into contracts where there were none. Moreover, in Yee, the Court concluded that "[b]ecause they voluntarily open[ed] their property to occupation by others, petitioners cannot assert a per se right to compensation based on their inability to exclude particular individuals."<sup>147</sup>

Likewise, MTE owners subject to a nondiscriminatory MTE access requirement retain a meaningful choice to restrict the access of any and all telecommunications carriers. They are not compelled to permit access to anyone in the first instance. However, as in Yee, once they have "open[ed] their property to occupation by others" -- for example, the ILEC -- the government

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<sup>145</sup> See Federal Communications Comm'n v. Florida Power Corp., 480 U.S. 245 (1987) (limiting Loretto to find a permanent physical occupation only where the element of "required acquiescence" is present).

<sup>146</sup> Id. at 252 ("This element of required acquiescence is at the heart of the concept of occupation.").

<sup>147</sup> Yee, 503 U.S. at 531 (citing Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 261 (1964)).

retains a legitimate regulatory interest in that relationship and MTE owners cannot assert a physical invasion takings claim.

Because nondiscriminatory MTE access, by definition, addresses situations in which one carrier already has access to an MTE, cases involving subsequent entry (such as Yee) are more closely analogous to a nondiscriminatory MTE access requirement than cases which address the allowance of an initial "invasion" (such as Loretto). Building access, properly implemented, would merely regulate the practice of allowing access rather than mandating the same.

In sum, the Takings Clause does not operate as a barrier to a nondiscriminatory MTE access requirement. A nondiscriminatory MTE access requirement merely regulates an existing contractual relationship. Moreover, it does not compel MTE owner participation in the first instance.

## **VII. CONCLUSION**

Congress intended that the provisions of the 1996 Act would promote competition among telecommunications carriers. However, individuals and businesses that are located in MTEs are at a distinct disadvantage to receiving the benefits of competition because building owners may restrict -- indeed, are restricting -- tenant access to competitive carriers. Specifically, some building owners have refused carrier access altogether or have insisted upon burdensome lease terms such that it does not make business sense for competitive carriers to provide service in those buildings. Without clear guidance from the FCC that all telecommunications carriers must have nondiscriminatory access to

MTEs, true competitive choice may not reach many occupants of MTEs, thereby thwarting Congress' goal to promote competition in telecommunications markets throughout the United States to the benefit of all consumers.

While several States have provided the means by which carriers may achieve access to MTEs, the Commission's intervention in this area is needed because there are many States that have not provided for such access. As recently confirmed by the Supreme Court in AT&T v. Iowa Utilities Board, the Commission retains the authority to prescribe rules and regulations that are necessary to carry out the Communications Act of 1934, as amended. Indeed, it is evident from the general provisions in the Act granting the Commission authority over "radio" and "wire" communications, that the Commission has the authority to require nondiscriminatory access to MTEs. Moreover, specific provisions in the 1996 Act -- Sections 224, 706, and 207 -- further support nondiscriminatory access to MTEs.

For purposes of telecommunications competition and maximum tenant choice, the Commission should design rules or recommendations that adhere to and promote the principle of nondiscrimination. Specifically, nondiscriminatory access to MTEs should encompass rooftop access, inside wiring, riser cables, telephone closets, and NIDs. Access to these facilities not only will enable competitors to provide telecommunications services to tenants in MTEs, but further Congress' goal to enhance competition in telecommunications markets.

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## CERTIFICATE OF SERVICE

I, Rosalyn Bethke, do hereby certify that on this 27th day of August 1999, copies of the foregoing Comments of The Association for Local Telecommunications Services filed today with the FCC in WT Docket No. 99-217/CC Dkt No. 96-98 were served by hand delivery on the following parties:

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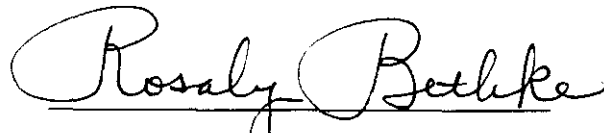
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